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An overview of the concept of medical intervention and informed consent according to Turkish law

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ABSTRACT

Medical intervention refers to any action taken against the physical and mental structure of the person for the purpose of treatment by an authorized person in the medical field. Medical interventions without legal compliance conditions constitute a crime legally. In order for the intervention to be lawful; The person performing the medical intervention must be a physician, there must be the necessary indication for medical intervention, the patient must have informed consent, and the physician must perform a meticulous medical intervention in accordance with the requirements of medical science. According to our constitution, people have the right to determine their own future. Therefore, the physician must obtain the consent of the patient before intervening in the patient's bodily integrity. The aim of the physician to heal the patient does not give any privilege to the physicians in this regard. According to the legislation, it can be stated that it is more appropriate to make the enlightenment verbally, but it would be more beneficial to put the verbal clarification in writing in terms of proof of the clarification. In order for the patient's consent to be valid, the patient must have a good grasp of the subject to which he or she gave consent. For this reason, the patient should be fully illuminated.

Keywords: Medical intervention, law, informed consent, consent,

INTRODUCTION

In order to diagnose and treat the diseases, some examinations are performed on the patients, treatment is planned for the diagnosis made as a result of the examinations, and some interventions are made to the patients.[1] In this case, we come across the concept of medical intervention. It is very important for physicians to know the legal dimension of their medical interventions. Medical interventions are considered as a violation of bodily immunity from a legal point of view, as well as an intervention in private life.[2,3] In this case, "why are not all physicians held legally responsible for their medical interventions and prosecuted?" the question comes to our mind. We can say that the reason for this is that the intervention is made in accordance with the law. Physicians can defend themselves better and feel safer only when they are sure that their medical intervention is legal.[4] In this article, it is aimed to talk about the legal dimension of the concept of medical intervention, the conditions required for the medical intervention to be legal, and the concept of informed consent, which is based on the literature data and the opinions in the doctrine.

THE CONCEPT OF MEDICAL INTERVENTION

Medical intervention refers to any action taken against the physical and mental structure of the person for the purpose of treatment by an authorized person in the medical field, according to the patient rights regulation and biomedicine agreement.[5-7] The main purpose of medical interventions is limited to correcting the deterioration in the physical and mental structure of the person. However, studies such as plastic surgery, sterilization, vaccination, and population planning, which are not for treatment purposes and are performed based on the consent of the person, are also considered medical interventions.[8]

LEGAL DIMENSION OF THE CONCEPT OF MEDICAL INTERVENTION AND LEGAL COMPLIANCE REQUIREMENTS

There is a consensus in Turkish Law that any medical intervention by a physician such as medication, psychotherapy, and surgery is "injury".[3] In addition, medical interventions mean a violation of bodily immunity from a legal point of view, as well as an intervention in private life according to the European Court of Human Rights.[2,3] For this reason, medical interventions that do not comply with the law may be criminal offenses, and physicians may be liable for compensation for this reason.[2] For this reason, it is important to ensure compliance with the law in order to avoid liability for the physician. However, in case of legal

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compliance reasons, medical intervention turns into a lawful action.[9] The reasons for compliance with the law are expressed in many national and international regulations such as the Constitution, laws, regulations, statutes, and treaties.[2] Article 17 of the Constitution of the Republic of Turkey states that "Everyone has the right to live and to protect and develop their material and spiritual existence. Except for medical obligations and the cases are written in the law, the body integrity of the person cannot be touched; cannot be subjected to scientific and medical experiments without his consent." it is called. According to the first 4 articles of the Law on the Execution of Medicine and Medical Arts, the person performing the medical intervention must be a physician, again, Article 70 of the same law, Article 6 of the Law on Organ and Tissue Removal, Storage, and Transplantation, Article 4 of the Law on Population Planning, Article 5 of the Biomedicine Convention and According to Article 5 of the Patient Rights Regulation, informed consent is required.[3] Accordingly, in order for the medical intervention to be in accordance with the law; **1**- the person performing the medical intervention must be a physician, **2**- the necessary indication for the medical intervention must be present, **3**- the informed consent must be present, and **4**- the physician must perform a meticulous medical intervention in accordance with the requirements of medical science.[3] It is also important which of the conditions of compliance with the law are fulfilled in the distinction of whether the legal responsibility of the physician is the result of intentional or negligent action. According to Hakeri, in the absence of the first three conditions, liability will arise due to an intentional action on the part of the medical responder, while only in the absence of the last condition, liability due to the negligence is mentioned.[3]

INFORMED CONSENT

Informed consent, which is one of the conditions of legality is one of the important issues that physicians should pay attention to. The right to determine one's own future is guaranteed by Article 17 of our constitution. Therefore, the physician must obtain the patient's consent before intervening in the patient's bodily integrity.[3] The aim of the physician to heal the patient does not give any privilege to the physicians in this regard.[3] This shows us that the patient's wish, which is decided with free will, comes before the patient's well-being.[3] However, in order for the patient's consent to be valid, proper illumination is essential. Otherwise, the validity of the given consent is not mentioned.[3] Even if the medical intervention is performed by the physician in accordance with all the rules and is successful, the physician may be held responsible in terms of criminal law.[3] Despite this, it is thought that there is a lack of information in health institutions and physicians about the importance of informed consent, in other words, informed consent, and they should be informed in terms of ethical and legal obligations.[10]

The clarification process to be made to the patient or patient's relatives and the informed consent forms to be signed should be in an understandable language, in an understandable language, in accordance with the social and cultural level of the other party, taking into account the education level of the other party, and should be easily readable.[1,10,11] In order for the patient to decide on medical intervention in an enlightened and conscious manner, she/he must have sufficient information about the medical intervention and its details.[12] In this context, the patient should be informed verbally, in writing, and, if necessary, using various visuals. This information should include titles such as the reasons for the medical intervention, the benefits it will provide, the harms it may cause, other intervention methods, and the situations that may be caused by not applying the intervention.[13] The most detailed provisions on this subject are included in the patient rights regulation. According to this; the patient's disease and the causes of the disease, how the disease will continue, the content of the medical intervention to be performed, who will perform this intervention, how the intervention will be performed, how long the intervention will take, other intervention options, if any, the benefits and harms of the intervention options, the risks and complications that may be encountered, information such as the important characteristics of the drugs to be used, the lifestyle recommendations that are critical for the patient's health, and how to reach medical help on the same issue when necessary, and the situations that the patient will encounter if he/she does not accept the intervention should be explaned to the patient.[10,14] In addition, the patient may be harmed due to the side effects of the drugs to be used for treatment. It is up to the physician to explain all these possibilities in a way that the patient can understand and to enable the patient to make a free decision.[15,16] It is also very important to answer the patient's questions. It is also important that the patient is in a position to make a decision after adequate information in terms of both ethics and law.[10] It is important that the patient has the power to discriminate and makes the decision of acceptance or rejection voluntarily.[17] If the patient has legal capacity, informed consent must be obtained from the patient, and if the patient is not in a position to give consent or does not have legal capacity, it should be obtained from her legal representative.[1]

Although it is stated that obtaining informed consent in written form will make it easier for the patient to understand the information given, it is stated in the patient rights regulation that the enlightenment should be made verbally, and it is more appropriate to give verbal information from the legal point of view.[10]

As a rule, the physician who will perform the medical intervention should fulfill the obligation to enlighten.18 However, if it is obligatory for different people to carry out the informing and intervention, this should be explained to the patient. In this case, it should be clarified by a physician who has the ability to inform.[14,19] If the physician who will do the intervention will not be able to inform, it is important that the physician who will do the informing instead of that physician has a good command of the subject. In addition, the physician who will perform the intervention should make sure that the informing is done.[14,20]

Health professionals other than physicians should also inform about the medical interventions they are authorized. For example, a physiotherapist should tell the patient about the risks that may develop due to the exercises he will perform.[14,21]

Informing should be done to the patient herself/himself. The severity of the disease or the fact that the patient's psychology may be adversely affected does not change this rule. Informing the spouse, son or other relatives of the patient does not make the consent valid.[14,18] If the patient does not have the power to distinguish, the guardian or guardian is informed. In the case of a small and limited patient who has the power to discriminate, both the patient himself and

his parent or guardian should be informed.[22] However, it would be more appropriate to inform the child in a way that the child can understand.[14]

The patient should be given a reasonable period of time, except for emergencies, so that she can research and make a healthy decision about the medical intervention or alternatives to be applied after the information given to her/him.[14] Under the European Statute on Patients' Rights, it is stated that information should be given at least 24 hours before the medical intervention.[16] Especially in major surgical interventions, attention should be paid to informing 24 hours before the surgery as a rule, and informing the evening before the surgical intervention should be avoided.[14]

Care should be taken to ensure that the information to be provided is personal to the patient. This method should not be preferred since the previously prepared printed information cannot sufficiently inform the patient.[16] While informing the patient, audio and video recordings can be taken by informing the patient.[14] In a decision of the Council of State, it has been stated that the information document prepared in a printed way is not a valid information due to the lack of details of the treatment to be applied, possible side effects, what are the expected benefits with the treatment, complications, alternative treatments and the risks that may occur in case of rejection of the treatment.[23] The Court of Cassation did not consider the form prepared in print as informative with similar decisions.[24,25]

INFORMED CONSENT IN MINORS WHO DO NOT HAVE THE CAPACITY TO CONSENT

Since the legal representative is the parents for the minors who do not have the capacity to consent, both parents must give the consent together. If the parents cannot make a joint decision on giving consent, a court decision should be taken, taking into account the best interests of the child. If there is a suspicion that the parents are preventing the child's treatment, the judge can also decide on their own.[26] In emergencies, the physician can decide for himself, which is very beneficial for the child, but if it is not urgent and the indication is controversial, it is important to obtain the consent of the parents. The decision should be made taking into account the danger situation of the minor.[27] If the parents of the minor are divorced, the authority to give consent belongs to the party holding the custody of the child.[14]

SUPREME COURT DECİSİONS AND INFORMED CONSENT

Courts give particular importance to the informing phase when making decisions. The Court of Cassation declared the expert report that did not mention the issue of informing and consent invalid in one of its decisions. Also considered the expert's failure to examine whether or not the informing was made as an incomplete examination and research, and concluded that a judgment could not be made in this way.[28]

In the decisions of the Council of State and the Supreme Court, it is stated that it is not sufficient to just have the consent document signed, it is necessary to inform the person verbally, and the information and document that the patient has been informed should be included in the file.[29,30] Again, in a decision taken by the Council of State, it was stated that it was necessary to investigate whether detailed information was given about complications since a consent document that was not fully read by the patient was signed by the patient.[31] In a decision of the Court of Cassation, it was stated that the risks of the treatment method for the health of the patient, the use of the given drugs, and possible side effects should be clarified. In addition, he did not consider it sufficient to be aware of side effects and complications in general terms. Considered it necessary to explain what kind of complications the surgery had.[32]

According to an opinion, it was stated that it is not necessary to explain the risks that may occur with all their possibilities, and it was stated that it would be appropriate to describe the risks by drawing a general framework.[14,16] However, the Supreme Court ruled that the consent obtained was invalid on the grounds that there was no indication in a decision that the physician directed the patient to a treatment with less complication probability.[33]

A point that should be given importance; The fact that the patient's consent at the stage of the medical intervention contract does not mean that the patient consents to all subsequent interventions. Informed consent should be obtained from the patient again, taking into account the changing conditions during the treatment phase.[34] It should not be understood that the patient consented to all the interventions to be applied during the treatment process based on his/her initial will.[34] However, these decisions have been criticized by some authorities as they impose a wide disclosure obligation on physicians for all kinds of medical interventions.[14]

Another point to be considered is; patient consent alone is not sufficient in terms of the legality of medical intervention. The physician cannot apply everything that the patient consents to the patient. It cannot apply an intervention that does not have an indication, only at the request of the patient.[3] In this case, the physician will be responsible for the absence of an indication, even if the patient consents.

CONCLUSION

As a result, in the absence of compliance with the law, medical interventions performed by physicians while performing their profession constitute a crime in terms of law. For this reason, it is very important for physicians to know the necessary conditions for the medical intervention to be in compliance with the law, to have a good command of the legislation related to their profession, and to act accordingly. In order for the intervention to be lawful; The person performing the medical intervention must be a physician, there must be the necessary indication for medical intervention, the patient must have informed consent, and the physician must perform a meticulous medical intervention in accordance with the requirements of medical science. Among these conditions, sensitivity should be shown by taking into account the judicial decisions regarding the issue of informed consent.

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